



DEPARTMENT OF THE TREASURY

Office of the Comptroller of the Currency

[Docket ID OCC–2013–0020]

Federal Reserve System

[Docket No. OP-1474]

Federal Deposit Insurance Corporation

Proposed Addendum to the Interagency Policy Statement on Income Tax Allocation in a Holding Company Structure

AGENCIES: Board of Governors of the Federal Reserve System, Federal Deposit Insurance Corporation, and Office of the Comptroller of the Currency, Department of the Treasury (Agencies).

ACTION: Proposed joint guidance with request for comment.

SUMMARY: The Agencies are proposing to issue jointly an Addendum (Proposed Addendum) to the “Interagency Policy Statement on Income Tax Allocation in a Holding Company Structure” (63 FR 64757, Nov. 23, 1998) to ensure that insured depository institutions (IDIs) in a consolidated group maintain an appropriate relationship regarding the payment of taxes and treatment of tax refunds. The Proposed Addendum would instruct IDIs and their holding companies to review their tax allocation agreements to ensure that the agreements expressly acknowledge that the holding company receives a tax refund from a taxing authority as agent for the IDI and are consistent with certain of the requirements of sections 23A and 23B of the Federal Reserve Act. The Proposed Addendum includes a sample paragraph that IDIs would include in their tax allocation agreements to facilitate the Agencies’ instructions.

DATES: Comments must be received by [DATE THAT IS 30 DAYS FROM THE DAY OF PUBLICATION IN THE FEDERAL REGISTER].

ADDRESSES: Interested parties are encouraged to submit written comments jointly to all of the Agencies. You may submit comments, identified by “Addendum to the Interagency Policy Statement on Income Tax Allocation in a Holding Company Structure” by any of the following methods:

Office of the Comptroller of the Currency

Because paper mail in the Washington, DC area and at the OCC is subject to delay, commenters are encouraged to submit comments by e-mail, if possible. Please use the title “Proposed Addendum to the Interagency Policy Statement on Income Tax Allocation in a Holding Company Structure” to facilitate the organization and distribution of the comments. You may submit comments by any of the following methods:

- **Web site:** *Federal eRulemaking Portal* — “[Regulations.gov](http://www.regulations.gov)”: Go to <http://www.regulations.gov>. Enter “Docket ID OCC–2013–0020” in the Search Box and click “Search.”. Results can be filtered using the filtering tools on the left side of the screen. Click on “Comment Now” to submit public comments. Click on the “Help” tab on the Regulations.gov home page to get information on using [Regulations.gov](http://www.regulations.gov).
- **E-mail:** mail to:regs.comments@occ.treas.gov.
- **Mail:** Legislative and Regulatory Activities Division, Office of the Comptroller of the Currency, 400 7th Street SW., Suite 3E–218, Mail Stop 9W–11, Washington, DC 20219.
- **Fax:** (571) 465–4326.
- **Hand Delivery:** 400 7th Street SW., Suite 3E–218, Mail Stop 9W–11, Washington, DC 20219.

Instructions: Because paper mail in the Washington, DC area and at the OCC is subject to delay, commenters are encouraged to submit comments by the Federal eRulemaking Portal or email, if possible. Please use the title “Addendum to the Interagency Policy Statement on Income Tax Allocation in a Holding Company Structure” to facilitate the organization and distribution of the comments. In general, OCC will enter all comments received into the docket and publish them on the Regulations.gov Web site without change, including any business or personal information that you provide such as name and address information, email addresses, or phone numbers. Comments received, including attachments and other supporting materials, are part of the public record and subject to public disclosure. Do not enclose any information in your comment or supporting materials that you consider confidential or inappropriate for public disclosure. To view comments electronically: Go to <http://www.regulations.gov>. Enter “Docket ID OCC–2013–0020” in the Search box and click “Search.”. Comments can be filtered by agency using the filtering tools on the left side of the screen. Click on the “Help” tab on the Regulations.gov home page to get information on using Regulations.gov, including instructions for viewing public comments, viewing other supporting and related materials, and viewing the docket after the close of the comment period. You may personally inspect and photocopy comments at the OCC, 400 7th Street SW., Washington, DC. For security reasons, the OCC requires that visitors make an appointment to inspect comments. You may do so by calling (202) 649–6700. Upon arrival, visitors will be required to present valid government-issued photo identification and submit to security screening in order to inspect and photocopy comments.

The Board of Governors of the Federal Reserve System

- **Agency Web site:** <http://www.federalreserve.gov>. Follow the instructions for submitting comments at <http://www.federalreserve.gov/apps/foia/proposedregs.aspx>.
- **Federal eRulemaking Portal:** <http://www.regulations.gov>. Follow the instructions for submitting comments.
- **E-mail:** regs.comments@federalreserve.gov. Include the Board's docket number in the subject line of the message.
- **Facsimile:** (202) 452–3819 or (202) 452–3102.
- **Mail:** Robert deV. Frierson, Secretary, Board of Governors of the Federal Reserve System, 20th Street and Constitution Avenue NW., Washington, DC 20551.
- **Instructions:** All public comments are available from the Board's Web site at <http://www.federalreserve.gov/apps/foia/proposedregs.aspx> as submitted, unless modified for technical reasons. Accordingly, your comments will not be edited to remove any identifying or contact information. Public comments also may be viewed electronically or in paper form in Room MP–500 of the Board's Martin Building (20th and C Streets NW.) between 9:00 a.m. and 5:00 p.m. on weekdays.

Federal Deposit Insurance Corporation

- **Agency Web site:** <http://www.fdic.gov/regulations/laws/federal/propose.html>. Follow instructions for submitting comments on the Agency web site.
- **E-mail:** Comments@fdic.gov. Include “Addendum to Interagency Policy Statement on Income Tax Allocation in a Holding Company Structure,” on the subject line of the message.

- **Mail:** Robert E. Feldman, Executive Secretary, Attention: Comments, Federal Deposit Insurance Corporation, 550 17th Street, NW., Washington, DC 20429.
- **Hand Delivery:** Comments may be hand-delivered to the guard station at the rear of the 550 17th Street Building (located on F Street) on business days between 7:00 a.m. and 5:00 p.m.
- **Instructions:** All comments received must include the agency name and “Addendum to Interagency Policy Statement on Income Tax Allocation in a Holding Company Structure.” All comments received will be posted without change to <http://www.fdic.gov/regulations/laws/federal/propose.html>, including any personal information provided. Paper copies of public comments may be ordered from the FDIC Public Information Center, 3501 North Fairfax Drive, Room E-1002, Arlington, VA 22226, by telephone at (877) 275-3342 or (703) 562-2200.

FOR FURTHER INFORMATION CONTACT:

Office of the Comptroller of the Currency: Steven Key, Assistant Director for Bank Activities and Structure, Bank Activities and Structure Division, Chief Counsel’s Office, 202-649-5594 or steven.key@occ.treas.gov; Gary Jeffers, Counsel, Bank Activities and Structure Division, Chief Counsel’s Office, 202-649-6208 or gary.jeffers@occ.treas.gov, Office of the Comptroller of the Currency, 400 7th Street SW., Washington, DC 20219.

Board of Governors of the Federal Reserve System: Laurie Schaffer, Associate General Counsel, (202) 452-2272, Benjamin McDonough, Senior Counsel, (202) 452-2036, Pamela Nardolilli, Senior Counsel, (202) 452- 3289, or Will Giles, Counsel, (202)

452-3351, Legal Division; or Matthew Kincaid, Sr. Accounting Policy Analyst, (202) 452-2028, Division of Banking Supervision and Regulation, Board of Governors of the Federal Reserve System, 20th Street and Constitution Avenue NW., Washington, DC 20551. Users of Telecommunication Device for Deaf (TDD) only, call (202) 263-4869.

Federal Deposit Insurance Corporation: Robert Storch, Chief Accountant, 202-898-8906 or rstorch@fdic.gov; Mark G. Flanigan, Counsel, Legal Division, 202-898-7426 or mflanigan@fdic.gov; Jeffrey E. Schmitt, Counsel, Legal Division, 703-562-2429 or jschmitt@fdic.gov.

SUPPLEMENTARY INFORMATION:

I. Background

In 1998, the Agencies and the Office of Thrift Supervision issued the “Interagency Policy Statement on Income Tax Allocation in a Holding Company Structure” (Interagency Policy Statement) to provide guidance to IDIs and their holding companies and other affiliates (Consolidated Groups) regarding the payment of taxes on a consolidated basis.¹ One of the principal goals of the Interagency Policy Statement is to protect IDIs’ ownership rights in tax refunds, while permitting the Consolidated Group to file consolidated tax returns. The Interagency Policy Statement states that: (1) tax settlements between an IDI and its holding company should be conducted in a manner that is no less favorable to the IDI than if it were a separate taxpayer; and (2) a holding company receives a tax refund from a taxing authority as agent for the IDI.

Since adoption of the Interagency Policy Statement, there have been many disputes between holding companies in bankruptcy and failed IDIs regarding the

¹ 63 FR 64757 (Nov. 23, 1998).

ownership of tax refunds generated by the IDIs. In these disputes, some courts have found that tax refunds generated by an IDI were the property of its holding company based on certain language contained in their tax allocation agreement that the courts interpreted as creating a debtor-creditor relationship. Accordingly, the Agencies are proposing to issue an Addendum to the Interagency Policy Statement (Proposed Addendum) to ensure that IDIs in a Consolidated Group maintain an appropriate relationship regarding the payment of taxes and treatment of tax refunds.

II. Description of Proposed Addendum

The Proposed Addendum is intended to clarify and supplement the Interagency Policy Statement to ensure that tax allocation agreements expressly acknowledge an agency relationship between a holding company and its subsidiary IDI to protect the IDI's ownership rights in tax refunds. The Proposed Addendum also would clarify how certain of the requirements of sections 23A and 23B of the Federal Reserve Act (FRA) apply to tax allocation agreements between IDIs and their affiliates.

The Proposed Addendum states that, to further the goals of the Interagency Policy Statement, IDIs and their holding companies should review and ensure that their tax allocation agreements explicitly acknowledge that an agency relationship exists between the holding company and its subsidiary IDIs with respect to tax refunds and do not contain other language to suggest a contrary intent. The Proposed Addendum includes a sample paragraph for IDIs and their holding companies to use in their tax allocation agreements, which the Agencies generally would deem to adequately acknowledge that an agency relationship exists for purposes of the Interagency Policy Statement, the Proposed Addendum, and sections 23A and 23B of the FRA.

The Proposed Addendum also would clarify that all tax allocation agreements are subject to the requirements of section 23B of the FRA, and tax allocation agreements that do not clearly acknowledge that an agency relationship exists may be subject to additional requirements under section 23A of the FRA. Moreover, the Proposed Addendum would clarify that section 23B of the FRA requires a holding company to promptly transmit tax refunds received from a taxing authority to its subsidiary IDI. The sample paragraph in the Proposed Addendum would incorporate this expectation.

III. Request for Comment

The Agencies invite comment on all aspects of the Proposed Addendum.

1. What other or additional mechanisms, if any, should the Agencies consider to clarify their expectations regarding tax allocation agreements between an IDI and any parent holding company?
2. What modifications, if any, could the Agencies make to the Proposed Addendum, including the sample paragraph, that would reduce burden on IDIs and their parent holding companies?

IV. Administrative Law Matters

Paperwork Reduction Act

In accordance with the Paperwork Reduction Act of 1995 (44 U.S.C. 3506; 5 CFR part 1320, Appendix A.1), the Agencies reviewed the Proposed Addendum guidance for any collection of information. The Agencies may not conduct or sponsor, and an organization is not required to respond to, an information collection unless the information collection displays a currently valid Office of Management and Budget control number. There is no collection of information contained in the Proposed

Addendum.

V. Text of the Proposed Addendum

The text of the Proposed Addendum follows:

ADDENDUM TO INTERAGENCY POLICY STATEMENT ON INCOME TAX ALLOCATION IN A HOLDING COMPANY STRUCTURE

In 1998, the Board of Governors of the Federal Reserve System (Board), the Federal Deposit Insurance Corporation (FDIC), the Office of the Comptroller of the Currency (OCC) (collectively, the Agencies), and the Office of Thrift Supervision (OTS) issued the “Interagency Policy Statement on Income Tax Allocation in a Holding Company Structure” (the “Interagency Policy Statement”).² Under the Interagency Policy Statement, members of a consolidated group, comprised of one or more insured depository institutions (IDIs) and their holding company and affiliates (the Consolidated Group), may prepare and file their federal and state income tax returns as a group so long as the act of filing as a group does not prejudice the interests of any one of the IDIs. That is, the Interagency Policy Statement affirms that intercorporate tax settlements between an IDI and its parent company should be conducted in a manner that is no less favorable to the IDI than if it were a separate taxpayer and that any practice that is not consistent with the policy statement may be viewed as an unsafe and unsound practice prompting either informal or formal corrective action.

² 63 FR 64757 (Nov. 23, 1998). Responsibilities of the OTS were transferred to the Board, FDIC, and OCC pursuant to Title III of the Dodd-Frank Wall Street Reform and Consumer Protection Act.

The Interagency Policy Statement also addresses the nature of the relationship between an IDI and its parent company. It states in relevant part that:

- “[A] parent company that receives a tax refund from a taxing authority obtains these funds as agent for the consolidated group on behalf of the group members,” and
- A Consolidated Group’s tax allocation agreement should not “characterize refunds attributable to a subsidiary depository institution that the parent receives from a taxing authority as the property of the parent.”

Since the issuance of the Interagency Policy Statement, courts have reached varying conclusions regarding whether tax allocation agreements create a debtor-creditor relationship between a holding company and its IDI.³ Some courts have found that the tax refunds in question were the property of the holding company in bankruptcy (rather than property of the subsidiary IDI) and held by the holding company as the IDI’s debtor.⁴ The Agencies are issuing this addendum to the Interagency Policy Statement (Addendum) to explain that Consolidated Groups should review their tax allocation agreements to ensure the agreements achieve the objectives of the Interagency Policy Statement. This Addendum also clarifies how certain of the requirements of sections

³ Case law on this issue is mixed. *Compare Zucker v. FDIC, as Receiver for BankUnited*, 2013 WL 4106387, *6 (11th Cir. Aug. 15, 2013) (“The relationship between the Holding Company and the Bank is not a debtor-creditor relationship. When the Holding Company received the tax refunds it held the funds intact - as if in escrow - for the benefit of the Bank and thus the remaining members of the Consolidated Group.”) with *In re IndyMac Bancorp, Inc.*, 2012 WL 1951474, *2 (C.D. Ca. May 30, 2012) (“According to both bankruptcy law and California contract law, the [tax allocation agreement in question] creates a debtor/creditor relationship.”).

⁴ See e.g., *In re IndyMac Bancorp, Inc.*, 2012 WL 1951474 (C.D. Ca. May 30, 2012).

23A and 23B of the Federal Reserve Act (FRA) apply to tax allocation agreements between IDIs and their affiliates.

In reviewing their tax allocation agreements, Consolidated Groups should ensure the agreements (1) clearly acknowledge that an agency relationship exists between the holding company and its subsidiary IDIs with respect to tax refunds, and (2) do not contain other language to suggest a contrary intent.⁵ In addition, all Consolidated Groups should amend their tax allocation agreements to include the following paragraph or substantially similar language:

The [holding company] is an agent for the [IDI and its subsidiaries] (the “Institution”) with respect to all matters related to consolidated tax returns and refund claims, and nothing in this agreement shall be construed to alter or modify this agency relationship. If the [holding company] receives a tax refund from a taxing authority, these funds are obtained as agent for the Institution. Any tax refund attributable to income earned, taxes paid, and losses incurred by the Institution is the property of and owned by the Institution, and shall be held in trust by the [holding company] for the benefit of the Institution. The [holding company] shall forward promptly the amounts held in trust to the Institution. Nothing in this agreement is intended to be or should be construed to provide the [holding company] with an ownership interest in a tax refund that is attributable to income earned, taxes paid, and losses incurred by the

⁵ This Addendum clarifies and supplements but does not replace the Interagency Policy Statement.

Institution. The [holding company] hereby agrees that this tax sharing agreement does not give it an ownership interest in a tax refund generated by the tax attributes of the Institution.

Going forward, the Agencies generally will deem tax allocation agreements that contain this or similar language to acknowledge that an agency relationship exists for purposes of the Interagency Policy Statement, this Addendum, and sections 23A and 23B of the FRA.

All tax allocation agreements are subject to the requirements of section 23B of the FRA, and tax allocation agreements that do not clearly acknowledge that an agency relationship exists may be subject to additional requirements under section 23A of the FRA.⁶ In general, section 23B requires affiliate transactions to be made on terms and under circumstances that are substantially the same, or at least as favorable to the IDI, as comparable transactions involving nonaffiliated companies or, in the absence of comparable transactions, on terms and circumstances that would in good faith be offered to non-affiliated companies.⁷ Tax allocation agreements should require the holding company to forward promptly any payment due the IDI under the tax allocation agreement and specify the timing of such payment. Agreements that allow a holding company to hold and not promptly transmit tax refunds received from the taxing authority and owed to an IDI are inconsistent with the requirements of section 23B and subject to supervisory action. However, an Agency's determination of whether such provision, or the tax allocation agreement in total, is consistent with section 23B will be

⁶ Section 23A requires, among other things, that loans and extensions of credit from a bank to its affiliates be properly collateralized. 12 U.S.C. § 371c(c).

⁷ 12 U.S.C. § 371c-1(a). Transactions subject to section 23B include the payment of money by a bank to an affiliate under contract, lease, or otherwise and transactions in which the affiliate acts as agent of the bank. *Id.* at § 371c-1(a)(2) & (a)(4).

based on the facts and circumstances of the particular tax allocation agreement and any associated refund.

Dated: December 9, 2013.
Thomas J. Curry,
Comptroller of the Currency.

By order of the Board of Governors of the Federal Reserve System, December 12, 2013.

Robert deV. Frierson,
Secretary of the Board.

By order of the Board of Directors.

Federal Deposit Insurance Corporation.

Dated at Washington, DC this 30th day of October, 2013.

Robert E. Feldman,

Executive Secretary.

BILLING CODES: 4810-33-P; 6210-01-P; 6714-01-P

[FR Doc. 2013-30130 Filed 12/18/2013 at 8:45 am; Publication Date: 12/19/2013]